

DARREN J. LEMIEUX, Nevada Bar No. 9615  
 LUCY C. CROW, Nevada Bar 15203  
 LEWIS ROCA ROTHGERBER CHRISTIE LLP  
 One East Liberty Street, Suite 300  
 Reno, Nevada 89501  
 Tel: 775.823.2900  
 Fax: 775.823.2929  
 Email: DLemieux@lewisroca.com  
 LCrow@lewisroca.com

*Attorneys for Intervenor*

UNITED STATES DISTRICT COURT  
 DISTRICT OF NEVADA

MARY SPETH, as trustee of the  
 THERESA FRISCH TRUST,

Plaintiff,

v.

CITY OF RENO, a political subdivision of the  
 State of Nevada,

Defendant,

and

CAI RENO HOTEL PARTNERS LLC

Intervenor.

Case No.: 3:23-cv-396

**CAI RENO HOTEL PARTNERS LLC'S  
 OPPOSITION TO PLAINTIFF'S  
 MOTION FOR PRELIMINARY  
 INJUNCTION [ECF NO. 6]**

As CAI Reno Hotel Partners LLC's ("CAI"), Motion to Intervene has been granted, Intervenor CAI by and through its counsel of record, hereby opposes Plaintiff's Motion for Preliminary Injunction (ECF No. 6). This Opposition is supported by the attached Memorandum of Points and Authorities and the papers and pleadings on file in this action. CAI cross-references the exhibits attached to the Motion to Intervene as "MTI" in citations.

///

///

///

///

1  
2 DATED this 6th day of October, 2023.  
3

4 LEWIS ROCA ROTHGERBER CHRISTIE  
5 LLP

6 By: /s/ Darren J. Lemieux

Darren J. Lemieux, Bar No. 9615

7 Lucy C. Crow, Bar No. 13757

8 One East Liberty Street, Ste 300

Reno, Nevada 89501

9 Tel.: 303.623.9000

Fax: 303.623.9222

10 dlemieux@lewisroca.com

11 lcrow@lewisroca.com

12 *Attorneys for Defendant-Intervenor*  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

Every day that Plaintiff is connected to the sewer line running through its property and to the CAI property, Plaintiff's sewage is leaking out of the decrepit sewer line and into the CAI property abutting the Truckee River. Yet, Plaintiff asks for the extraordinary relief of enjoining the City from engaging in a minimally invasive construction project to realign Plaintiff's sewer access from the leaking sewer line to the City's current sewer system that services all surrounding properties. In effect, Plaintiff asks this Court to issue a preliminary injunction allowing Plaintiff to continue polluting the land and the Truckee River (and to continue trespassing on CAI's property, being a nuisance to CAI, and interfering with CAI's development of a hotel on its property).

Plaintiff does not even approach its burden to show it is entitled to extraordinary relief. Plaintiff cannot succeed on the merits of its claims against the City because the City's project benefitting Plaintiff, and giving Plaintiff access to a functioning sewer system, cannot be construed as an unconstitutional "taking." In truth, Plaintiff brings its unsustainable claims merely to interfere with (or better yet, to prevent) CAI's development of a hotel on the property next to Plaintiff's property. This is an improper basis to seek a preliminary injunction, or to initiate litigation (because Plaintiff already had its opportunity to object to the project). Unlike Plaintiff, CAI brings its claims for a proper purpose and is far more likely to succeed on its trespass, nuisance, negligence, and interference with economic advantages claims against Plaintiff for Plaintiff's continuous dumping of its sewage.

Plaintiff will not suffer irreparable harm either because the City's project will not terminate Plaintiff's access to the sewer system altogether. The City's project will merely realign access to the system so that Plaintiff is disconnected from the rotting sewer line and its sewage no longer seeps into the ground. Regardless, any harm from that realignment can be remedied with monetary damages.

Equally important, the balance of equities heavily weighs against a preliminary injunction because the City and CAI's interests—in the sanitary disposal of waste, stopping Plaintiff from leaking sewage into the land, and developing the CAI property—far outweigh any minor

1 inconvenience to Plaintiff of having its sewage connection realigned. The public's interest also lies  
 2 in promoting commercial activity and protecting the environment and the Truckee River from  
 3 Plaintiff's contamination. Accordingly, Plaintiff cannot satisfy its high burden for a preliminary  
 4 injunction, let alone its burden to provide actual evidence of a likely harm, especially in the face of  
 5 the harm posed to CAI and the public.

6 Attempting to distract from the merits of its ill-fated Motion, Plaintiff has crafted a false  
 7 narrative that the City is realigning Plaintiff's access to the sewer system solely for the benefit of  
 8 CAI. While it is true that Plaintiff's sewage access must be realigned because it is harming CAI  
 9 and delaying its development of a hotel, it is also true that the sewer access must be realigned  
 10 regardless of whether CAI is developing the neighboring property. Plaintiff's sewage is seeping out  
 11 of the cracked sewer line and into land adjacent to the Truckee River. This poses a severe  
 12 environmental risk to the Truckee River, which is why the City has endeavored to connect the  
 13 surrounding properties to the new sewer system.

14 CAI respectfully requests that this Court deny the Motion. If, however, this Court grants the  
 15 Motion, Plaintiff should be required to post a bond to offset harm to the City and CAI if the sewage  
 16 line catastrophically fails and the harm to CAI of having its project halted while this action is  
 17 pending.

## 18 **II. FACTUAL BACKGROUND**

### 19 **A. Plaintiff Refuses to Realign its Sewer Access and Plaintiff's Sewer Leaks into** 20 **the CAI Property, Adjacent to the Truckee River**

21 CAI owns five properties bordering the Truckee River in downtown Reno, Nevada, that  
 22 CAI intends to develop into a Kimpton Hotel ("Kimpton"). *See MIT at Ex. 1 ¶ 3, Ex. 5, Ex. 6.*  
 23 Those five properties are located at 260 Island Avenue (APN 011-112-02), 0 Island Avenue (APN  
 24 011-112-03), 223 Court Street (APN 011-112-06), 0 Court Street (APN 011-112-07), and 219 Court  
 25 Street (APN 011-112-12) (collectively, "CAI Property"). *Id.* at **Ex. 6.** Plaintiff represents the  
 26 Theresa Frisch Trust, which owns the neighboring property located at 247 Court Street (APN 011-  
 27 112-11) ("Plaintiff's Property") with a house called the "Frisch House." *Id.*; *see also* ECF No. 1  
 28 ¶ 12.

Both properties and the adjacent Truckee River are depicted below (**MTI at Ex. 6**; *see also id.* at **Ex. 5**):



There is a 70-year-old main sewer line that runs from Arlington Avenue through Plaintiff's Property to the CAI Property. ECF No. 11-6 (map depicting sewer lines); ECF No. 1 ¶ 15. This main sewer line connects to lateral sewer lines running to the house on Plaintiff's Property. *See* ECF No. 11-6. Sewage from Plaintiff's Property then runs downstream (west to east) to the CAI Property.<sup>1</sup> *See id.*; *see also* **MTI at Ex. 2 ¶¶ 5-6**; *id.* at **Ex. 7**. Plaintiff's sewage is the only sewage upstream from the CAI Property that still runs through the old clay lines.<sup>2</sup> *See id.* at **Ex. 2 ¶ 7**.

In August 2022, CAI retained an inspector to evaluate the main sewage line and lateral lines that run from Arlington Avenue through Plaintiff's Property to the CAI Property. *Id.* at **Ex. 2 ¶¶ 8-9**; *id.* at **Ex. 7**. The inspector snaked a video camera through the old clay sewer lines, which revealed that the clay sewer line is deteriorating and leaking sewage from Plaintiff's Property into the CAI Property. *See id.* at **Ex. 2 ¶ 9**; *id.* at **Ex. 7**; *see also id.* at **Ex. 1 ¶ 7**. The senior project manager for

<sup>1</sup> Downstream of Plaintiff's Property is east of Arlington Avenue, toward Rainbow Street, and parallel to the Truckee River, Island Avenue, and Court Street. *See* **MTI at Exs. 5, 6, 7**. In **Exhibit 6** to the Motion to Intervene, which is the photograph on the preceding page, this is left to right.

<sup>2</sup> Park Towers, a condominium building on Island Street situated adjacent to both Plaintiff's Property and the CAI Property, was previously connected to the clay sewer line, but its sewer access has since been realigned. **MTI at Ex. 2 ¶ 7**.

CAI's contractor, Ross Penney, also inspected the clay sewer line through a manhole on the CAI Property and could visibly see the clay sewer line cracked and leaking. *Id.* at **Ex. 2** ¶ 9. Mr. Penney is aware that the City's own contractor, Q & D Construction, inspected the sewer line too and concluded that it is deteriorating and cracked in numerous places. *Id.* ¶ 10. When Plaintiff's sewage flows from Plaintiff's Property to the CAI Property, Plaintiff's sewage seeps directly into the CAI Property (and likely into Plaintiff's Property too). *Id.* ¶ \*11; *see also id.* at **Ex. 1** ¶ 7.

In addition to polluting the CAI Property, Plaintiff's sewage has entirely halted CAI from being able to obtain funding or start construction of the Kimpton. **MTI at Ex. 1** ¶¶8-9; *id.* at **Ex. 2** ¶ 14. Every single month that Plaintiff continues to pollute the CAI Property, CAI is forced to pay (through itself or its guarantor) \$150,000 for its loan on the CAI Property *without* being able to move forward with the development. *Id.* at **Ex. 1** ¶ 9. Indeed, because of Plaintiff's actions, CAI cannot obtain new investors and risks losing its agreement with IHG Hotels & Resorts to build the Kimpton.<sup>3</sup> *Id.* ¶ 8. If IHG Hotels & Resorts terminates its agreement for the construction of the Kimpton, the CAI Property could lose a significant amount of its value. *Id.* ¶ 10.

To avoid these issues, CAI initially attempted to resolve the sewer line issues at CAI's own expense. *See, e.g.*, ECF No. 11-2 (Mr. Penney informing Plaintiff's representative, "[W]e are prepared to perform the work to connect all 3 parties directly to the city sewer system at our expense" (emphasis added)). While the other property upstream from the CAI Property agreed to realignment, Plaintiff unreasonably refused to do so because Plaintiff wants to prevent CAI from constructing a parking garage and believes that refusing to fix the sewer line will prevent the construction. *See id.*; *see also* ECF No. 11-5 (Mr. Speth asserting that fixing the sewer line is a "scheme to defraud . . . so [CAI] can build a parking garage"). In other words, Plaintiff refuses to connect to the newer line, and wishes to continue using the rotting line, to halt the development of the Kimpton at an immense cost to CAI.

The decaying main and lateral sewer lines, however, must be terminated regardless of whether CAI is constructing the Kimpton because the lines are failing and posing an environmental

<sup>3</sup> IHG Hotels & Resorts owns the Kimpton brand. *See, e.g.*, 2022 Annual Report, available at <https://www.ihgplc.com/en/-/media/ihg/annualreports/2022/annual-report-2022.pdf>.



1 risk to Plaintiff's Property, the CAI Property, and the Truckee River. ECF No. 7 at 3. Given these  
 2 concerns, the City took its own action. *See* ECF No. 7 at 2-3; ECF No. 11-4. As part of its larger  
 3 efforts to update the sewer system in Reno, Nevada, the City set out to terminate the 1950s sewer  
 4 line and connect Plaintiff's Property to the City's up-to-date sewage system. *See* ECF No. 7 at 2-3;  
 5 ECF No. 11-4. On May 22, 2023, the City informed Plaintiff that Public Works was scheduled to  
 6 discontinue service and abandon the existing City sewer main on September 1, 2023. *See* ECF No.  
 7 1-5. The City gave Plaintiff the option to either allow the City to realign and reconnect the sewage  
 8 line at the City's expenses or to hire Plaintiff's own contractor to perform the work. *See id.* On July  
 9 12, 2023, the City sent a follow-up letter stating that the City was prepared to commence the work  
 10 on August 1, 2023, and it would take approximately three weeks to complete. ECF No. 1-6. While  
 11 the work itself would take three weeks to complete, the switchover would take less than one day.  
 12 *See* ECF No. 7 at 4. In other words, Plaintiff's Property would be connected to a sewer line during  
 13 construction, except for part of one day. *See id.* The construction is also minimally invasive,  
 14 requiring the City to only dig a trench for the new lateral connection. **MTI at Ex. 2 ¶ 12.**

15 Despite the 70-year-old clay sewer line oozing sewage into the CAI Property and likely  
 16 Plaintiff's Property too, Plaintiff has refused the City's efforts to connect to the new system and  
 17 abandon the rotting clay line. *See generally* ECF No. 1.

#### 18 **B. Plaintiff's Claims Against the City of Reno**

19 Attempting to halt the development of the Kimpton and to stop the City from cutting off  
 20 service to the leaking sewer line, Plaintiff filed this action and moved for a preliminary injunction.  
 21 *See* ECF No. 1; ECF No. 6. Against the City, Plaintiff brings four claims: (1) under 42 U.S.C. §  
 22 1983 for violation of the Takings Clause of the Fifth Amendment, alleging that the City has taken  
 23 Plaintiff's private property for public use without just compensation (ECF No. 1 ¶¶ 44-55), (2) for  
 24 inverse condemnation, alleging again that the City has taken Plaintiff's private property for public  
 25 use without just compensation (*id.* ¶¶ 56-64), (3) for declaratory relief under 28 U.S.C. § 2201,  
 26 seeking a declaration that the City has taken Plaintiff's property and Plaintiff is entitled to  
 27 compensation (*id.* ¶¶ 65-71), and (4) for injunctive relief, seeking to restrain the City from "cutting  
 28 off Plaintiff's sewer service until just compensation is first paid" (*id.* ¶¶ 72-80). As set forth below,

1 Plaintiff's claims are factually and legally untenable and its requested relief must be denied.

2 Two days after bringing this action, Plaintiff filed its Motion for a Preliminary Injunction,  
3 asking the Court to issue an injunction to "prevent the City from cutting off the Plaintiff's sewer  
4 service until Plaintiffs [*sic*] are paid just compensation for the use of their property for public  
5 purposes." ECF No. 6 at 14. In effect, Plaintiff seeks an order from this Court allowing the 1950s  
6 clay line to continue leaking into the CAI Property and to allow Plaintiff to continue trespassing on  
7 CAI Property. *See generally id.* Plaintiff did not attach any evidence to its Motion, relying solely  
8 on its Complaint and documents attached to it. *See id.*

9 The City opposed the Motion on August 29, 2023, correctly pointing out that Plaintiff's  
10 claims cannot succeed on their merits because nothing is being taken from Plaintiff, including  
11 because Plaintiff is receiving access to a new sewage line *and* the City is paying for it. *See generally*  
12 ECF No. 7. The City also explained that Plaintiff will not suffer any harm by receiving access to a  
13 new sewer line, least of all irreparable harm. *See id.* In Plaintiff's September 5, 2023, reply, Plaintiff  
14 cited an article in the Reno Gazette Journal as "evidence" that the sewer line is being realigned  
15 solely for CAI while arguing (without evidence) that the City's construction plans are incorrect.  
16 *See* ECF No. 9. Plaintiff also submitted a declaration from Plaintiff's husband, Matt Speth, in  
17 which he summarily concludes that construction on Plaintiff's Property will interrupt business. *See*  
18 *generally* ECF No. 9.

19 **C. CAI's Requested Intervention and Counterclaims**

20 Although Plaintiff did not bring any claims against CAI, Plaintiff's claims against the City  
21 directly impact CAI because Plaintiff seeks permanent and preliminary injunctive relief to continue  
22 using a sewer line that is leaking sewage into the CAI Property, and Plaintiff does so to delay or  
23 stop the development of the Kimpton. *See generally* **MTI**. Plaintiff's sewage is severely damaging  
24 CAI because its property is being polluted, CAI cannot move forward with raising capital or  
25 construction, and CAI could lose the ability to construct the Kimpton altogether, resulting in a  
26 multi-million-dollar loss to CAI because of Plaintiff's sewage. **MTI at Ex. 1 ¶ 10**. CAI has sought  
27 to intervene in this action and assert counterclaims for trespass, nuisance, negligence, and  
28 interference with economic advantage. *See* **MTI at Ex. 4**.



### 1 **III. LEGAL STANDARD**

2 “A preliminary injunction is an extraordinary remedy never awarded as of right.” *Winter v.*  
 3 *Nat’l Res. Def. Council, Inc.*, 129 S. Ct. 365, 376 (2008). A preliminary injunction can be awarded  
 4 only upon “a clear showing that the plaintiff is entitled to such relief.” *Id.* “To obtain this relief, a  
 5 plaintiff must establish (1) that [it] is likely to succeed on the merits, (2) that [it] is likely to suffer  
 6 irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in [its]  
 7 favor, and [4] that an injunction is in the public interest.” *Fraihat v. U.S. Immigration & Customs*  
 8 *Enforcement*, 16 F.4th 613, 635 (9th Cir. 2021).

9 The moving party must make a “‘clear showing’ of evidence that supports each relevant  
 10 preliminary injunction factor.” *Hartford v. Ferguson*, 3:23-CV-05364-RJB, 2023 WL 3836230, at  
 11 \*2 (W.D. Wash. June 6, 2023) (quoting *Winter*, 129 S. Ct. at 365) (emphasis added). “[A] court  
 12 cannot grant a preliminary injunction based on ‘pronouncements [ ] grounded in platitudes rather  
 13 than evidence.’” *Schwartz-Tallard v. HSBC Bank USA, Nat’l Ass’n*, 2:17-CV-02328-RFB-NJK,  
 14 2018 WL 6566541, at \*2 (D. Nev. Nov. 20, 2018) (quoting *Herb Reed Enters., LLC v. Fla. Entm’t*  
 15 *Mgmt., Inc.*, 736 F.3d 1239, 1250 (9th Cir. 2013)); *see also W. Watersheds Project v. Bureau of*  
 16 *Land Mgmt. of U.S. Dep’t of the Interior*, 3:21-CV-00103-MMD-CLB, 2021 WL 3779147, at \*5  
 17 (D. Nev. July 23, 2021) (Chief J. Du) (ruling that speculative evidence was insufficient to merit a  
 18 preliminary injunction).

### 19 **IV. THE MOTION FOR PRELIMINARY INJUNCTION SHOULD BE DENIED**

20 Plaintiff asks this Court to enter an injunction allowing Plaintiff’s sewage to continue to  
 21 leak into and trespass onto the CAI Property merely because Plaintiff refuses to allow the City to  
 22 proceed with construction paid for by the City. Plaintiff’s request for a preliminary injunction  
 23 should be denied because Plaintiff fails to satisfy its burden on any of the preliminary injunction  
 24 factors. Plaintiff cannot succeed on the merits of its claims because the City is not taking anything  
 25 from Plaintiff, but giving Plaintiff access to a new and functioning sewer system. Plaintiff will not  
 26 suffer an irreparable injury because allowing the City to proceed benefits Plaintiff and any harm  
 27 can be remedied with a monetary award. And the balance of equities and public interest favor  
 28 stopping Plaintiff from leaking sewage into riverfront properties and allowing the development of

1 the Kimpton to proceed. The Motion should be denied.

2 **A. Plaintiff Cannot Succeed on the Merits of Its Claims**

3 Plaintiff falls woefully short of making a clear showing that it will succeed on the merits of  
4 its claims. Plaintiff repeats verbatim the “factual” allegations in its Complaint, then summarily  
5 concludes that “the facts above describe that the City of Reno is placing unconstitutional conditions  
6 on the continued occupation of the Frisch House.” *Compare* ECF No. 1 ¶¶ 35-43 *with* ECF No. 6  
7 at 7-10; *see also compare* ECF No. 1 ¶¶ 8-31 *with* ECF No. 6 at 2-5. Plaintiff cannot satisfy its  
8 burden by relying upon allegations alone. *See, e.g., Panno v. Wells Fargo Bank, N.A.*, 2016 WL  
9 7494896, at \*5 (C.D. Cal. June 13, 2016) (explaining that a plaintiff seeking a preliminary  
10 injunction cannot “simply point[ ] to allegations in his Complaint”); *see also Knauer v. Kaiser*  
11 *Permanente Int’l, Inc.*, 94 Fed. App’x 470, 471 (9th Cir. 2004) (ruling that it is an abuse of  
12 discretion to issue a preliminary injunction where there is no evidence in the record that plaintiffs  
13 are likely to succeed on the merits). In its Motion, Plaintiff did not present any evidence in support  
14 of its summary conclusions that it prevails on the merits of its claims. *See* ECF No. 6. Although  
15 Plaintiff attached some documents (and RGJ article and conclusory declaration) to its Reply brief,  
16 none of the documents further Plaintiff’s position. *See* ECF No. 11.

17 Plaintiff brings three substantive claims (one for a “taking” in violation of the Fifth  
18 Amendment’s Takings Clause, a second for inverse condemnation, and a third for injunctive relief)  
19 and one request for declaratory relief that is dependent upon the Takings Clause claim. *See* ECF  
20 No. 1 ¶¶ 44-80. Plaintiff cannot succeed on the merits of any of these claims.

21 First, “[a] property owner has an actionable Fifth Amendment takings claim when the  
22 government takes his property without paying for it.” *Knick v. Twp. of Scott, Pennsylvania*, 139 S.  
23 Ct. 2162, 2167 (2019). “That does not mean that the government must provide compensation in  
24 advance of a taking or risk having its action invalidated: So long as the property owner has some  
25 way to obtain compensation after the fact, governments need not fear that courts will enjoin their  
26 activities.” *Id.* at 2167-68 (emphasis added). Here, the City plans to abandon its own main line and  
27 realign Plaintiff’s lateral line to a new main line at the City’s own expense. *See* ECF No. 1-5.  
28 Plaintiff will be the owner of the new lateral line paid for by the City, and Plaintiff’s old line will

1 stop leaking sewage into the CAI Property. *Id.*; *see also* ECF No. 7 at 6. The City is not “taking”  
 2 any private property; rather, it is giving Plaintiff access to a newer, better system. Plaintiff  
 3 nevertheless insists that the City is temporarily taking its property without cause, and solely to  
 4 accommodate CAI, because “[t]he current sewer lateral at [Plaintiff’s Property] is functioning  
 5 without issues.” ECF No. 11 at 7. But the current lateral line is not functioning without issue. **MTI**  
 6 **at Ex. 1 ¶ 7; id. at Ex. 2 ¶¶ 8-11.** The current lateral line is pushing Plaintiff’s sewage into the  
 7 main line, which is then leaking Plaintiff’s waste into the CAI Property. *Id.* at **Ex. 1 ¶ 7; id. at Ex.**  
 8 **2 ¶ 11; id. at Ex. 7.** This poses a serious risk to the public and CAI and exposes Plaintiff to liability  
 9 for damages incurred from its sewage and contamination. Regardless, this claim does not provide  
 10 a basis for a preliminary injunction because there is no “taking” as long as the party is compensated  
 11 “after the fact.” *Knick*, 139 S. Ct. at 2167-68.

12 Second, an inverse condemnation claim requires “(1) a taking (2) of real or personal interest  
 13 in private property (3) for public use (4) without just compensation being paid (5) that is  
 14 proximately caused by a governmental entity (6) that has not instituted formal proceedings.” *Fritz*  
 15 *v. Washoe Cty.*, 376 P.3d 794, 796 (Nev. 2016). These six requirements are not met here: (1 & 2)  
 16 the City is not “taking” property, but giving Plaintiff property at the City’s expense, (3) the new  
 17 lateral sewer line is not for “public use,” but Plaintiff’s use and will stop Plaintiff’s sewage from  
 18 leaking into the CAI Property, (4) the City has agreed to pay for the entire realignment and new  
 19 lateral line (*see* ECF No. 1-5), (5 & 6) while the City is the “governmental entity” causing the  
 20 realignment, the City did so through proper means and repeatedly contacted Plaintiff about the need  
 21 to realign the sewer (*e.g., id.*).

22 Third, Plaintiff seeks permanent injunctive relief to stop the City from terminating service  
 23 to the rotting main sewer line and leaking lateral line until “just compensation” is paid. ECF No. 1  
 24 ¶¶ 72-80. To obtain a permanent injunction, “[a] plaintiff must demonstrate: (1) that it has suffered  
 25 an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate  
 26 to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff  
 27 and defendant, a remedy in equity is warranted; and (4) that the public interest would not be  
 28 disserved by a permanent injunction.” *eBay Inc. v. MercExchange, L.L.C.*, 126 S. Ct. 1837, 1839

(2006). These requirements overlap with the preliminary injunction standard and are each discussed *infra* in Sections IV(B), (C), and (D). Briefly, Plaintiff cannot show it will suffer irreparable harm or that monetary damages are inadequate because Plaintiff seeks “just compensation,” which is inherently monetary. The balance of hardships and public interest weigh in favor of denying injunctive relief because CAI and the public’s interests in stopping sewage from leaking into the land and Truckee River are far stronger than Plaintiff’s interest in using a 70-year-old rotting sewer line. Like its request for a preliminary injunction, Plaintiff’s request for a permanent injunction will fail.

Fourth, Plaintiff seeks a declaration that the City has taken Plaintiff’s property in violation of the Fifth Amendment (ECF No. 1 ¶¶ 65-71), but Plaintiff is not entitled to this relief because there has been no taking. The declaratory relief claim necessarily fails because the Takings Clause claim fails.

Accordingly, Plaintiff has failed to satisfy its burden for the first requirement for a preliminary injunction because Plaintiff has not proffered evidence to support its claims and cannot do so because they are not meritorious.

**B. Although Plaintiff Will Not Suffer Irreparable Harm, CAI Will Suffer Irreparable Harm if the Preliminary Injunction is Granted**

Plaintiff cannot satisfy its second burden either because Plaintiff will not suffer irreparable harm if its access to the sewer system is realigned and the damaged lined abandoned. At most, these are monetary injuries that can be remedied without injunctive relief.

“A plaintiff seeking a preliminary injunction must demonstrate that irreparable injury is likely in the absence of preliminary relief.” *Enyart v. Nat’l Conference of Bar Examiners, Inc.*, 630 F.3d 1153, 1165 (9th Cir. 2011). “Mere possibility of harm is not enough.” *Id.* (emphasis added). “Purely monetary injuries are not normally considered irreparable.” *Lydo Enters., Inc. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984). “Allegations of irreparable harm must be supported with actual evidence, and not merely conclusory statements or unsupported allegations.” *Nevada v. United States*, 364 F. Supp. 3d 1146, 1151 (D. Nev. 2019) (emphasis added).

Plaintiff argues that it will suffer an irreparable injury if the City proceeds because its

1 “property may not be occupied, and the eight tenants who currently rent business space at the office  
2 will be compelled to rent places to do business elsewhere,” which supposedly could cause Plaintiff  
3 to go out of business. ECF No. 6 at 10-11; *see also* ECF No. 11 at 8 (repeating arguments). Plaintiff  
4 severely misunderstands the irreparable harm requirement.

5 The question before the Court is what will happen in the “absence of preliminary relief.”  
6 *Enyart*, 630 F.3d at 1165. Meaning, the question is not what will happen if Plaintiff is left entirely  
7 without a connection to a sewage system; the question is what will happen if the City proceeds to  
8 connect Plaintiff’s Property to the City’s current sewage system and abandon the leaking sewage  
9 line. In the absence of a preliminary injunction, Plaintiff will still have access to a sewer line,  
10 including during construction except for part of a day. ECF No. 7 at 4. It is doubtful that losing  
11 connection to the sewer system for less a day will harm Plaintiff and, if it does, this harm is not  
12 irreparable and can be remedied with monetary damages.<sup>4</sup> While Plaintiff makes a summary  
13 conclusion based on Mr. Speth’s declaration that the City’s construction plans have “errors,”  
14 Plaintiff does not explain what these supposed errors are, what harm they could possibly pose to  
15 Plaintiff, or what qualifications Mr. Speth has to opine on the sufficiency of construction plans. *See*  
16 ECF No. 11-7 ¶ 6. Mr. Penney, a construction project manager with nearly two decades of  
17 experience in large-scale construction, has declared that the trenching of Plaintiff’s Property is  
18 minimally invasive. **MTI at Ex. 2** ¶ 12. Accordingly, Plaintiff has not satisfied its burden to show  
19 that it will suffer irreparable harm, let alone its burden to provide actual evidence that a harm is  
20 likely to occur.

21 Instead, Plaintiff dramatizes the purported harm to it to halt CAI from developing the  
22 Kimpton. This is evident from Mr. Speth’s statements referring to the sewer realignment as a  
23 “scheme to defraud” Plaintiff so that “[CAI] can build a parking garage.” ECF No. 11-5. The  
24 Kimpton project has already been approved by the City and Plaintiff had its opportunity to object  
25 to the project. Plaintiff cannot now interfere with the development through alternative methods (at  
26

27 <sup>4</sup> The reconnection could happen on a weekend and not disrupt business at all. And if the  
28 reconnection is done on a weekday, Plaintiff or the City could easily retain the services of a  
temporary restroom facility. There is no need for Plaintiff’s tenants to suddenly abandon their  
offices for a minor inconvenience and doing so would likely be a breach of their leases anyway.

1 a significant cost to CAI and the public).

2 To be sure, even if Plaintiff's specious analysis applied, it is well-established that harm from  
 3 lost income (such as rent from tenants and the costs to replace them) can be remedied with money.  
 4 *Los Angeles Mem'l Coliseum Comm'n v. Nat'l Football League*, 634 F.2d 1197, 1202 (9th Cir.  
 5 1980) (explaining that "[t]he temporary loss of income, ultimately to be recovered, does not usually  
 6 constitute irreparable injury," and holding that a football stadium failed to show it would suffer  
 7 irreparable harm if it lost the Raiders football team as a tenant (internal quotation marks and citation  
 8 omitted)); *see also Mountain Paradise Vill., Inc. v. Fed. Nat. Mortg. Ass'n*, 2:13-CV-01813-GMN,  
 9 2013 WL 5637931, at \*2 (D. Nev. Oct. 15, 2013) (finding argument that a party would suffer  
 10 irreparable harm in the form of "loss of the rental income from the property" unpersuasive); *Gerber-*  
 11 *Williams v. Aurora Loan Servs., LLC*, C11-5393BHS, 2011 WL 2357644, at \*2 (W.D. Wash. June  
 12 13, 2011) ("The Court finds that the loss of rental income is not irreparable harm."). Plaintiff seeks  
 13 monetary damages in the form of "just compensation [to be] first paid for the taking of Plaintiff's  
 14 property." ECF No. 1 at 14 (emphasis added); *see also id.* ¶ 73. Plaintiff even concedes that its  
 15 alleged harms can be remedied with monetary damages, asserting "monetary damages might  
 16 address some concerns." ECF No. 6 at 11.

17 Plaintiff also argues that its purported "threat of being driven out of business" is irreparable,  
 18 but Plaintiff does not provide any credible evidence to support this argument. *Id.* (citing *N. Plains*  
 19 *Res. Council v. United States Army Corps of Eng'rs*, 460 F. Supp. 3d 1030, 1034 (D. Mont. 2020)  
 20 citing *hiQ Labs, Inc. v. LinkedIn Corp.*, 938 F.3d 985, 993 (9th Cir. 2019)). While it is generally  
 21 true that closure of a business may constitute irreparable harm, a plaintiff must still make a showing  
 22 based on actual evidence that there is a real threat to its business. *E.g.*, *Los Angeles Mem'l Coliseum*  
 23 *Comm'n*, 634 F.2d at 1202 (finding no irreparable harm where there was "no factual showing that  
 24 . . . the [football stadium] would be unable in the near future to obtain another transfer team or new  
 25 franchise as a tenant"). Plaintiff does not provide any evidence that it will be unable to replace lost  
 26 tenants or that the loss of tenants will force Plaintiff out of business. The only evidence proffered  
 27 by Plaintiff is the self-serving and conclusory declaration of Mr. Speth, "If we receive rent from  
 28 the tenants, the business will continue to exist. If not, it won't." ECF No. 11-7 ¶ 9. Mr. Speth does



1 not attest that these tenants are irreplaceable, does not provide any indication that the tenants can  
 2 simply break their leases without consequences, and does not attest that the business is in such  
 3 disrepair that it will, indeed, go out of business if it loses this income. *See id.*

4 Plaintiff will not suffer irreparable harm if the City proceeds to connect Plaintiff's Property  
 5 to the City's current sewage system and terminates service to the rotting clay line. Plaintiff's  
 6 arguments about loss of income and, possibly, going out of business are irrelevant to this Court's  
 7 analysis because they focus on only what would happen if the City disconnected Plaintiff from all  
 8 sewage systems and never reconnected Plaintiff—which is not what the City intends to do.  
 9 Regardless, these purported harms could be remedied with money. Therefore, Plaintiff has not  
 10 carried its burden to show it is likely to suffer irreparable harm.

### 11 C. The Balance of Equities Weighs Against Issuing Extraordinary Relief

12 The City's interest in the sanitary disposal of waste and CAI's interest in stopping Plaintiff's  
 13 sewage from continuing to leak into the CAI Property heavily outweighs the purported  
 14 inconvenience to Plaintiff of having its sewer access realigned at the City's cost. "In each case,  
 15 courts must balance the competing claims of injury and must consider the effect on each party of  
 16 the granting or withholding of the requested relief." *Winter*, 129 S. Ct. at 376 (internal quotation  
 17 marks and citation omitted).

18 Plaintiff asserts that "[t]he equities tip sharply in favor of relief for the Plaintiff because of  
 19 the facial strength of the claim," and Plaintiff re-hashes its Takings Clause claim. ECF No. 6 at 11-  
 20 12; *see also* ECF No. 11 at 8 (repeating allegations). Plaintiff also misunderstands this preliminary  
 21 injunction factor. Rather than relying on the "strength" of its claim, which is the first factor, the  
 22 third factor requires the Plaintiff to show that its alleged injury outweighs the injuries to the City  
 23 and CAI. *See, e.g., Winter*, 129 S. Ct. at 376. The only irreparable injury alleged by Plaintiff is  
 24 being without sewer services, supposedly disrupting Plaintiff's business. *See* ECF No. 6 at 10-11;  
 25 *see also* ECF No. 11 at 8. In his declaration, Mr. Speth asserts that Plaintiff's "main concern is the  
 26 smooth and consistent operation of the rental property," not the alleged constitutional violations  
 27 that can be remedied with monetary damages. ECF No. 11-7 ¶ 7. But as explained in the preceding  
 28 section, Plaintiff focuses on the wrong standard because it will not be left without sewer services if

1 the City proceeds; Plaintiff will be connected to the City's newer system with less than one day of  
2 disruption to its sewer access. *See* § IV(B).

3 In contrast, if the project does not proceed, the CAI Property will continue to be polluted  
4 by Plaintiff's waste and the development of the Kimpton will continue to be halted (possibly  
5 indefinitely) at significant expense to CAI. *See supra* § II(B). Each month that the project is delayed  
6 because Plaintiff refuses to realign its sewer services from the rotting sewer line to the City's sewer  
7 system, CAI must pay \$150,000.00 on its loan without being able to move forward with its  
8 development of the Kimpton, interest rates rise, and construction costs rise. *See MTI at Ex. 1 ¶¶*  
9 9-10. IHG Hotels & Resorts could terminate the agreement to construct the Kimpton altogether,  
10 resulting in millions of dollars of losses to CAI as a direct result of Plaintiff's actions. *See id.* CAI's  
11 interests heavily outweigh Plaintiff's interests, which are further undercut by Plaintiff's ulterior  
12 motive to halt CAI's development.<sup>5</sup>

13 **D. An Injunction Harms the Public's Environmental Interests and Interests in**  
14 **the Development of the Kimpton**

15 While the third preliminary injunction factor focuses on the parties' interests (*see supra* §  
16 IV(C)), the fourth factor focuses on the public's interest at large. "In exercising their sound  
17 discretion, courts of equity should pay particular regard for the public consequences in employing  
18 the extraordinary remedy of injunction." *Winter*, 129 S. Ct. at 376 (internal quotation marks and  
19 citation omitted). The public's interest in protecting the environment is well-recognized. *See, e.g.,*  
20 *Sierra Club v. United States*, 23 F. Supp. 2d 1132, 1135 (N.D. Cal. 1998) ("[E]nvironmental injury,  
21 by its nature, can seldom be adequately remedied by money damages and is often permanent or at  
22 least of long duration, i.e., irreparable." (internal quotation marks and citation omitted)). The  
23 public's interest in encouraging commercial and entertainment development is similarly well-  
24 established. *See, e.g., Am. Civil Liberties Union of Nevada v. City of Las Vegas*, 13 F. Supp. 2d  
25 1064, 1083 (D. Nev. 1998) ("The public interest in the economic success of the Mall venture as  
26 well as in maintaining an attractive environment for commercial and entertainment activities is  
27 advanced by the denial of a preliminary injunction which would bar the enforcement of the anti-

28 <sup>5</sup> The City's interest in the sanitary disposal of waste similarly outweighs Plaintiff's interest. *See* ECF No. 7 at 7.

solicitation ordinance in the Mall.”).

Plaintiff asks this Court to skip this factor altogether, arguing that “[a]n injunction in this matter will not have any impact beyond the parties to this case, as such, this factor should carry little weight in the Court’s analysis.” ECF No. 6 at 12. Plaintiff’s argument is at-odds with its narrative that the City and CAI are working together to deprive Plaintiff of its property rights, and at-odds with Plaintiff’s allegations that the replacement of the sewer line is necessary for the Kimpton to be built. ECF No. 1 ¶¶ 20-25; *see also* ECF No. 6 at 4-5. The outcome of this action directly impacts the City, CAI, and the public at-large, and this important factor cannot simply be disregarded by the Court. The public’s interest in the proper disposal of waste, protecting the Truckee River, and encouraging an attractive environment for commercial activities are aligned with the City and CAI’s interests. These public interests also strongly outweigh the private interests of Plaintiff.

At every step, Plaintiff relies on cursory allegations, fails to provide substantive evidence, and ignores applicable facts and law. Plaintiff fails to satisfy its burden to show a preliminary injunction is warranted. The Motion should be denied.

**V. IF A PRELIMINARY INJUNCTION ISSUES, PLAINTIFF SHOULD BE REQUIRED TO POST A BOND**

Under Federal Rule of Civil Procedure 65(c), a preliminary injunction can issue “only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained.” (emphasis added). This requirement is important because absent a bond “there can be no recovery for damages sustained by a wrongful issuance of a preliminary injunction.” *Buddy Sys., Inc. v. Exer-Genie, Inc.*, 545 F.2d 1164, 1167 (9th Cir. 1976).

Plaintiff should be required to post a bond to cover the expenses related to its sewage leaking on the CAI property, its continuing trespass, and the delays caused by these issues that could result in the termination of the Kimpton project. If the old sewer line is not replaced, it could catastrophically fail and cause sewage to severely damage the CAI Property (in addition to damage that has already occurred). Further, the longer the delay in the development of the Kimpton, the

1 more likely IHG Hotels & Resorts will terminate its agreement with CAI. This could result in  
 2 millions of dollars of losses to CAI, the least of which is the loss to the value of the CAI Property.  
 3 Despite the high stakes of this action, Plaintiff insists on continuing to trespass with its waste onto  
 4 the CAI Property and interfering with CAI's development of the Kimpton.

5 Accordingly, Plaintiff should be required to post a bond of \$500,000.00 to cover just a  
 6 fraction of the damages incurred by CAI as a result of Plaintiff's sewage dumping and the delay  
 7 caused by Plaintiff. While CAI is entitled to a much higher bond—and judgment—because  
 8 Plaintiff's unreasonable actions could cause CAI to lose tens of millions of dollars, CAI recognizes  
 9 that Plaintiff's Property is owned by a personal trust and, accordingly, has adjusted the bond  
 10 amount.

11 The City separately seeks a bond of \$93,500.00 to account for construction costs plus  
 12 interest and CAI agrees this is more than reasonable.

# 13 **VI. CONCLUSION**

14 For the foregoing reasons, CAI respectfully requests that this Court deny the Motion for  
 15 Preliminary Injunction. If this Court grants the Motion for Preliminary Injunction, CAI requests the  
 16 Court order Plaintiff to post a bond for, at minimum, \$593,500.00.

17 DATED this 6th day of October, 2023.

18  
 19 LEWIS ROCA ROTHGERBER CHRISTIE LLP

20 By: /s/ Darren J. Lemieux

21 Darren J. Lemieux, Bar No. 9615

22 Lucy C. Crow, Bar No. 13757

23 One East Liberty Street, Ste 300

24 Reno, Nevada 89501

25 Tel.: 303.623.9000

26 Fax: 303.623.9222

27 dlemieux@lewisroca.com

28 lcrow@lewisroca.com

*Attorneys for Applicant-Intervenor*

**CERTIFICATE OF SERVICE**

Pursuant to Federal Rule of Civil Procedure 5(b), I certify that I am an employee of Lewis Roca Rothgerber Christie LLP, and that on the 6th day of October, 2023, I caused the foregoing **OPPOSITION TO PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION** to be served by electronically filing the foregoing with the CM/ECF electronic filing system, which will send notice of electronic filing to:

Luke Busby, Esq.  
316 California Ave.  
Reno, Nevada 89509  
(775) 453-0112  
luke@lukeandrewbusbyltd.com

*Attorney for the Plaintiff*

Mark Hughs, Esq.  
Reno City Attorney's Office  
P.O. Box 1900  
Reno, NV 89505  
(775) 334-2050  
hughsm@reno.gov

*Attorney for Defendant*

/s/ Dawn Hayes  
Employee of Lewis Roca Rothgerber Christie LLP